



1 Yesterday the government belatedly suggested that the 9<sup>th</sup> Circuit Model Jury Instruction 8.20  
 2 (2010) defining the Elements of Conspiracy be changed to include the word “subagreements.”  
 3 The single argument made by the government for its suggestion was *United States v. Tille*, 729  
 4 F.2d 615, (9<sup>th</sup> Cir. 1984). A review of the case shows that it offers no authority or support to  
 5 alter the 9<sup>th</sup> Circuit’s Model Instruction defining the elements of conspiracy as suggested by the  
 6 government.

7 First, *Tille* was a RICO prosecution. It has absolutely nothing to do with either the Sherman  
 8 Act or a discussion of the elements of conspiracy. Second, the Court’s reference in the case  
 9 pertaining to “subagreements” was in the context of the admission of co-conspirator statements  
 10 and whether certain testimony was inadmissible hearsay, irrelevant and prejudicial. *Tille*, at 621.  
 11 There is absolutely nothing in *Tille* which supports, much less mentions, that the 9<sup>th</sup> Circuit  
 12 Model Instruction for the elements of conspiracy should be changed for this case.

13 In short, the question of whether there was a "single overall agreement" to violate the  
 14 Sherman Act, as charged, or multiple conspiracies, is a question for the jury to decide based on  
 15 the evidence. The jury question of whether there was a single conspiracy as opposed to multiple  
 16 conspiracies is not novel. Both theories of the case are fairly discussed and represented with the  
 17 9<sup>th</sup> Circuit Model instructions ordered yesterday by the Court. The government offers no legal  
 18 authority whatsoever supporting that the time tested model instruction for the elements of  
 19 conspiracy should now be changed for this case.

20 Dated: November 9, 2016

21 Respectfully Submitted,

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